

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

CA05-1310

June 14, 2006

HYDRO-WORKS, INC. and
NATIONAL HYDRAULICS AND
FABRICATION, INC.
APPELLANTS
V.

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[CR-03-865-5]

PRECISION INDUSTRIES,
INC., JAMES COLEMAN, and CATHY
WALTHERS
APPELLEES

HONORABLE XOLLIE DUNCAN,
CIRCUIT JUDGE

REBRIEFING ORDERED

Appellants, Hydro-Works, Inc. and National Hydraulics & Fabrication, Inc., appeal from the trial court's order granting partial summary judgment to appellees, Precision Industries, Inc., James Coleman, and Cathy Walthers. The order granting partial summary judgment was entered on June 20, 2005. It was modified by the trial court's order of August 11, 2005, to include a Rule 54(b) certification. We are unable to reach the merits of the appeal because of a failure to comply with our rules, namely briefing deficiencies, which will be discussed later in this opinion. Rebriefing is ordered.

As a preliminary matter, appellees contend that we lack jurisdiction to hear this appeal because the motion to modify the order granting partial summary judgment should have been *deemed* denied no later than August 5, 2005; that the notice of appeal should,

therefore, have been filed within thirty days of that date, *i.e.*, by September 6, 2005; and that because the notice of appeal was not filed until September 9, 2005, it was filed too late for this court to acquire jurisdiction. We disagree.

Appellees cite Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure – Civil, to support their position. It provides:

(b) *Extension of time for filing notice of appeal.*

(1) Upon timely filing in the circuit court of a motion for judgment notwithstanding the verdict under Rule 50(b) of the Arkansas Rules of Civil Procedure, a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), a motion for a new trial under Rule 59(a), *or any other motion to vacate, alter, or amend the judgment made no later than 10 days after entry of judgment*, the time for filing a notice of appeal shall be extended for all parties. *The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.*

(Emphasis added.) While we have no way of knowing because it was not included in the addendum or the record, judging by the court's August 11, 2005 order granting the motion, appellant's motion to modify seems solely to have been a request for Rule 54(b) certification. This type of motion and the orders granting it do not truly alter or amend the judgment; rather, they simply certify to this court that the trial court believes that a *non-final order* should nevertheless be heard by this court on appeal. Rule 4(b)(1), on the other hand, addresses motions that seek to alter or amend *final* judgments.

Here, because the order granting partial summary judgment was a *non-final* judgment, there was neither a ten-day limit to file the motion seeking 54(b) certification, nor a thirty-day limit to grant or deny it pursuant to Rule 4(b)(1). In short, Rule 4(b)(1) does not apply in this situation. Accordingly, we have jurisdiction to hear this appeal, but we decline to address the merits because of briefing deficiencies.

Appellants' points of appeal are as follows:

- I. There was no competent evidence to support the trial court's conclusion that the plaintiffs' trade practices violated the Arkansas Deceptive Trade Practices Act.
- II. There was no competent evidence to support the trial court's conclusion that the plaintiffs' trade secrets were not entitled to protection.
- III. There were genuine issues of material fact that precluded the trial court's grant of partial summary judgment.

These points were also listed in appellants' notice of appeal.

Rule 6 of the Arkansas Rules of Appellate Procedure - Civil, provides in pertinent part:

Rule 6. Record on appeal.

(b) *Transcript of proceedings.* On or before filing the notice of appeal, the appellant shall order from the reporter a transcript of such parts of the proceedings as he has designated in the notice of appeal and make any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c). *If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary thereto, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellant has designated less than the entire record or proceeding, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the*

filing of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

(c) *Record to be abbreviated.* All matters not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties. *Where parties in good faith abbreviate the record by agreement or without objection from opposing parties, the appellate court shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to appellant and reasonable opportunity to supply the deficiency. Where the record has been abbreviated by agreement or without objection from opposing parties, no presumption shall be indulged that the findings of the circuit court are supported by any matter omitted from the record.*

(Emphasis added.)

Here, appellants are contending that the trial court's conclusions were not supported by the evidence; yet, appellants have not provided this court with a record that is sufficient to make such a determination. The following is a chronology of pleadings, motions, and orders that have been filed in this case. This listing is based upon the docket sheet that is contained in the record but is not contained in the addendum. By each entry, we indicate whether the document was included in the record and/or appellant's addendum.

6-30-03 Complaint filed (Not included in either the record or the addendum)

7-17-03	Answer (Not included in record or addendum)
2-10-05	Defendant/appellee's motion for summary judgment (Not included in the addendum)
3-15-05	Plaintiff's/appellant's response to motion for summary judgment (Not included in the addendum)
4-4-05	Defendant's reply to response to motion for summary judgment (Not included in addendum)
6-20-05	Order granting partial summary judgment to defendant/appellee (Included in addendum)
7-5-05	Plaintiff's/appellant's motion to modify partial summary judgment (Not included in record or addendum)
7-14-05	Defendant's response to motion to modify (Not included in record or addendum)
8-11-05	Order modifying partial summary judgment order (Included in addendum)
9-9-05	Notice of appeal (Included in addendum)

Appellees complain in their brief about appellants' abstracting deficiencies and abbreviated record; however, there is no indication that they designated the inclusion of additional parts of the record pursuant to Rule 6(b) of the Arkansas Rules of Appellate Procedure – Civil. Even though appellees raised no objection to appellants' abbreviated record, "the appellate court shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to appellant and reasonable opportunity to supply

the deficiency ... [and] no presumption shall be indulged that the findings of the circuit court are supported by any matter omitted from the record.” Rule 6 (c), *supra*.

Because both the record lodged in this court and appellants’ brief fail to include documents that are essential to an understanding of this case, we find that they are deficient and that we therefore cannot reach the merits of the case. Appellants have fifteen days from the date of this opinion to obtain from the circuit clerk, and file with our clerk’s office, certified copies of all relevant documents not already included in the record. *See generally* Rule 6 (c) *supra*. Appellants will then have until July 14, 2006, to file a substituted abstract, addendum, and brief to conform with Rule 4-2 of the Rules of the Supreme Court and Court of Appeals. *See* Rule 4-2(b)(3). If appellants fail to file a complying brief within the prescribed time, the judgment may be affirmed for noncompliance with the Rule. After service of the substituted brief on the appellee, the appellee shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely upon their brief that was previously filed in this appeal. *See* Rule 4-2(b)(3) of the Rules of the Supreme Court and Court of Appeals.

Rebriefing ordered.

NEAL and ROAF, JJ., agree.